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12 UNITED STATES DISTRICT COURT
13 FOR THE EASTERN DISTRICT OF CALIFORNIA

14 DAVID M. FRIEDMAN *et al.*,
15 On behalf of all others similarly situated,
16 *Plaintiffs,*
17 v.
18 CALIFORNIA STATE EMPLOYEES
19 ASSOCIATION *et al.*,
20 *Defendants.*

Case No. CIV-S-00-00101 WBS/DAD

CLASS ACTION

**PLAINTIFFS' MOTION FOR AWARD
OF ATTORNEYS' FEES, COSTS AND
EXPENSES PURSUANT TO 42 U.S.C. § 1988**

HEARING DATE: July 19, 2010

TIME: 2:00 p.m.

**Courtroom of Judge William B. Shubb,
Courtroom 5, 14th Floor, Sacramento, CA**

22 Pursuant to 42 U.S.C. § 1988, Rules 23(h) and 54(d)(2), FED.R.CIV.P., and Local Rule
23 293, Plaintiffs David M. Friedman, *et al.*, on behalf of themselves and the class they represent,
24 respectfully request the court to award them their reasonable attorneys' fees and costs in the
25 agreed upon amount of \$45,500.00. In support thereof, plaintiffs state the following:

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I. INTRODUCTION AND FACTUAL BACKGROUND¹

This civil rights case (brought under 42 U.S.C. § 1983) was filed on January 18, 2000, by plaintiffs, nonunion employees of California State University (“CSU”), on behalf of themselves and a class of approximately 10,000 similarly-situated employees in bargaining units 2 (Health Care Support), 5 (Operations Support), 7 (Clerical/Administrative Support), and 9 (Technical Support) represented by Defendant California State Employees Association (“CSEA”).²

The class action complaint alleged, *inter alia*, that, effective January 1, 2000, CSEA would improperly withhold a portion of union dues from their paychecks without providing them with the procedural safeguards mandated by *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). Plaintiffs asked for declaratory and injunctive relief³ in addition to nominal damages.

In November 1999, CSEA mailed a “Notice to Fair Share Fee Payers” (“Original Notice”) to all nonunion members of bargaining units 2, 5, 7, and 9 informing them of their “fair share fee” and their right to object and pay a reduced fee. The Original Notice included a 1998 expenditure report of the CSU Division of CSEA upon which the fee and reduced fee were

¹The facts of this case are more fully discussed in previous orders issued by this court. Memorandum and Order [Denying Preliminary Injunction] (Feb. 14, 2000, Doc. No. 38); Memorandum and Order [Certifying Class] (March 15, 2000, Doc. No. 45), 163 L.R.R.M. (BNA) 2924; and Memorandum and Order [Granting Defendants’ Summary Judgment on Counts One and Two] (Nov. 14, 2000, Doc. No. 255).

²The current correct name of the defendant initially sued as “California State Employees Association, Local 1000, Service Employees International Union, AFL-CIO, CLC” is California State University Employees Union, SEIU Local 2579, California State Employees Association. Throughout this Notice “CSEA” will be used to refer to that defendant. The current State Controller John Chiang has automatically been substituted as the other defendant in this matter in place of his predecessor and original other defendant, Kathleen Connell.

³Plaintiffs moved for a temporary restraining order (“TRO”) on January 18, 2000 based on defendants’ alleged violation of the *Hudson* notice requirements. The court denied their motion on the record in open court. (Doc. No. 12) then moved for a preliminary injunction on the same basis. In an order filed February 15, 2000, the court denied the motion but noted: “There is at best a possibility that plaintiffs may ultimately succeed in establishing that the notices were procedurally defective because not sent contemporaneously with the audit reports. . .” (Doc. No. 38, slip op. at 9) The court also certified a class on March 15, 2000. (Doc. No. 48).

1 based. At the end of December 1999, CSEA sent an “Amended Notice” further lowering the fee
2 for individuals who objected. Neither notice included an audit of the financial records. Instead,
3 both notices stated that a copy of the independent audit was available upon request.

4 On January 22, 2000, defendants sent a copy of CSEA’s audited 1998 Financial
5 Statements (“the Audit”) to all nonunion members in the four bargaining units. The Audit
6 included a cover page encouraging all nonunion members to “compare the audit reports to the
7 [CSEA Original] Notice . . . and the Amended Notice” CSEA extended the period for
8 nonunion members to object to the expenditure calculation to February 15, 2000.

9 CSEA attached a “January 2000 Amended Notice to Fair Share Fee Payers” to the end of
10 the Audit materials (“January Notice”). The January Notice, among other things, lowered the fair
11 share fee payers’ dues, extended the date for individuals to object to the dues, and further reduced
12 the objecting fair share fee payers’ dues, but it did not contain the explanation of the basis for the
13 fee contained in the Original and Amended Notices.

14 Subsequently, in April/May, CSEA distributed a new notice that met the requirements of
15 *Hudson. Cummings v. Connell*, 177 F. Supp. 2d 1060, 1065 (E.D. Cal. 2001).

16 On November 15, 2000, the court granted defendants’ motion for summary judgment and
17 dismissed counts one and two of the complaint, which had challenged the facial constitutionality
18 of section 3583.5 of the California Government Code, which required nonmembers to either join
19 the union or pay a “fair share service fee.” (Doc. No. 255)

20 The remaining counts of this action, challenging the constitutional adequacy of the
21 Original, Amended and January Notices, were stayed pending final resolution of a related case
22 entitled *Cummings v. Connell*, No. CIV-S-99-2179 WBS DAD (E.D. Cal.), which concerned
23 other bargaining units of state employees represented by Defendant CSEA. Order Staying
24 Further Proceedings (Doc. No. 261).

25 The parties herein agreed

26 to be bound by the legal principles finally established in *Cummings* and apply them
27 to the present case in a good faith effort to resolve this case . . . [and] if it is
28 ultimately determined in *Cummings* that one or more of [Defendant California
State Employee Association, Local 1000 Service Employees International Union,
AFL-CIO’s (CSEA’s)] *Hudson* notices in that case were legally deficient, then

1 CSEA will accept, for settlement purposes, that the corresponding one or more of
2 CSEA's *Hudson* notices in this case were similarly deficient.

3 *Id.*

4 In *Cummings*, 177 F.Supp.2d at 1060, this court determined that the April and June 1999
5 notices to nonmembers were not adequate under *Hudson* because CSEA failed to provide a copy
6 of the audit in the absence of a nonmember's formal request. The court also found that the two
7 additional notices mailed in January 2000 were inadequate as a matter of law. Although the first
8 January notice contained an audit, it did not provide a new deadline for objecting. Thus, the
9 court held that it did not provide nonmembers with a reasonable opportunity to object. The
10 second January notice provided a new deadline for objecting, but directed nonmembers to the
11 June 1999 notice and the previously mailed audit for an adequate explanation of the basis for the
12 fee. Thus, the court held that the incorporated notice did not minimize the inherent infringement
13 on nonmembers' First Amendment rights. Therefore, the *Cummings*' plaintiffs were granted
14 summary judgment as to all four notices. *Cummings*, 177 F. Supp.2d at 1064-68, *aff'd on other*
15 *grounds*, 316 F.3d 886, 890-92 (9th Cir. 2002) (June notice was inadequate for failure to include
16 independent verification of reported expenditures).

17 Upon remand from, and in accordance with the mandate of, the Ninth Circuit, this court in
18 *Cummings* awarded nominal damages for CSEA's defective notices in the amount of \$1.00 to
19 each plaintiff and each member of the class. *Cummings v. Connell*, 2006 WL 1716160 (E.D.
20 Cal. 2006).⁴

21 Applying the mandate of the Ninth Circuit in *Cummings* to the instant case, on February
22 24, 2010, the court entered final judgment in favor of plaintiffs and against Defendant CSEA on
23 Counts 3, 4, 5, 7 and 8 of the Complaint. In accordance with the court's Memorandum and
24 Order of November 15, 2000, final judgment was entered in favor of defendants and against
25 plaintiffs on counts 1 and 2. Counts 6, 9 and 10 were dismissed as moot. In accordance with
26 *Cummings*, the court also awarded plaintiffs and the members of the class nominal damages of

27 ⁴The *Cummings* court also awarded plaintiffs attorneys' fees and expenses in the
28 unopposed amount of \$125,000.00. *Cummings v. Connell*, 2006 WL 3951867 (E.D. Cal. 2006).

1 \$1.00 each.

2 Plaintiffs' have simultaneously filed a motion for approval of a class notice, pursuant to
 3 Rule 23(h)(1), FED.R.CIV.P., which all parties have approved. In accordance with the 2001
 4 agreement "to be bound by the legal principles finally established in *Cummings* and apply them
 5 to the present case in a good faith effort to resolve this case," plaintiffs and Defendant CSEA
 6 have agreed that plaintiffs are prevailing parties under 42 U.S.C. § 1988, that, pending the court's
 7 approval, Defendant CSEA will pay plaintiffs \$45,500.00 in attorneys' fees, expenses and costs
 8 to bring this matter to a conclusion and avoid further litigation expenses, and that CSEA will not
 9 oppose the motion seeking the agreed-upon attorneys' fees. Declaration of Milton L. Chappell, ¶
 10 17 ("Chappell Decl., ¶ ____"), filed herewith.

11 **II. REQUESTED ATTORNEY'S FEES AND COSTS**

12 **A. Prevailing Party Status**

13 Pursuant to 42 U.S.C. § 1988, a court may award reasonable attorneys' fees to a plaintiff
 14 who is a "prevailing party" in a civil rights action. *Texas State Teachers Ass'n v. Garland*
 15 *Independent School Dist.*, 489 U.S. 782, 788 (1989). A "prevailing party" is one who succeeds
 16 on any significant issue in litigation, achieving some of the benefit sought in bringing the suit,
 17 and resulting in a "material alteration of the legal relationship of the parties." *Id.* at 792-93. It is
 18 not necessary for plaintiffs to be prevailing parties on every single claim in order to get attorneys'
 19 fees under 42 U.S.C. § 1988. *Jeff D. v. Andrus*, 899 F.2d 753, 765 (9TH CIR. 1989), citing
 20 *Hensley v. Eckerhart*, 461 U.S. 424, 428 (1983).

21 To be considered a prevailing party, "a plaintiff must 'obtain an enforceable judgment
 22 against the defendant from whom fees are sought, or comparable relief through consent decree or
 23 settlement.'" *G & G Fire Sprinklers, Inc. v. Bradshaw*, 136 F.3d 587, 600 (9th Cir. 1998),
 24 quoting *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992). This court certified a class (Doc. No.
 25 48) and entered judgment for plaintiffs on their *Hudson* claims and awarded them and the class
 26 nominal damages to be paid by Defendant CSEA. (Doc. No. 277) This confirms plaintiffs'
 27 prevailing party status, which defendants do not dispute. *See also Cummings v. Connell*, 2006
 28 WL 395187, at *1-*2 (E.D. Cal. 2006); *Hoirup v. Professional Eng'rs in Cal. Gov't.*, 2006 WL

2791158, at *2-3, 5 (E.D. Cal. 2006); *Cummings*, 177 F.Supp.2d 1079, 1083, 1090 (E.D. Cal. 2001) (awarding § 1988 attorneys' fees in agency fee cases in which defendants conceded plaintiffs' prevailing party status).

B. Reasonable Number of Hours Expended: The Lodestar Calculation

The Ninth Circuit has adopted the "lodestar" method for calculating attorneys' fees.

Under the lodestar approach, the court first determines a reasonable hourly rate. Then it multiplies that rate by the number of hours reasonably expended on the litigation to arrive at a presumptively reasonable fee. This lodestar amount may then be adjusted by considering the twelve factors set forth in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9TH CIR. 1975), *cert. denied*, 425 U.S. 951 (1976).

Allen v. Shalala, 48 F.3d 456, 458 (9th Cir. 1995) (footnote omitted). There is a strong presumption that the lodestar amount is reasonable. *Fischer v. SJB-P.C., Inc.*, 214 F.3d 115, 1119 n.4 (9th Cir. 2000). However, the court may adjust the lodestar figure if various factors overcome the presumption of reasonableness. *Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1983); *Cummings*, 2006 WL 3951867, at *2. Plaintiffs first discuss their lodestar calculation and then the factors that require adjustment of the lodestar.⁵

Attached hereto and made a part hereof as Exhibit A is the declaration of plaintiffs' lead counsel, Milton L. Chappell, ("Chappell Decl.") attesting to his qualifications, the qualifications of co-counsel Dylan B. Carp, and to the reasonable amounts of hours and expenses which have been expended in this case. The hours expended by Attorneys Chappell and Carp are documented by computer printouts, which are accurate and routinely prepared compilations of the daily time-sheets which are maintained in the normal course of his business. Chappell Decl., ¶ 18 & Ex. 1.

The 536.20 hours were all reasonably expended in the pursuit of this case – characterized

⁵Many of the *Kerr* factors have been subsumed in the lodestar approach. *Cunningham v. County of Los Angeles*, 879 F.2d 481, 487 (9th Cir. 1988). Other than "the amount involved and the results obtained" factor, which is discussed *infra*, none of the other *Kerr* factors justify any further adjustment to the award. Although the court should consider the *Kerr* factors, it need neither address nor discuss each factor. *G & G Fire Sprinklers, Inc. v. Bradshaw*, 136 F.3d 587, 600 (9th Cir. 1998); *Sapper v. Lenco Blade, Inc.*, 704 F.2d 1069, 1073 (9th Cir. 1983); *Cummings v. Connell*, 2006 WL 3951867, at *2 & n.4 (E.D. Cal. Nov. 27, 2006).

by four significant and contested pretrial motions and hearings, class notices and exclusions, discovery, the entry of judgment, settlement, and the instant attorneys' fees motion.⁶ *Id.*, ¶¶ 12, - 15, 19-22 & Ex. 1. This is comparable to the 687.05 lodestar hours used in *Cummings* for a similar amount of work. *Cummings*, 177 F.Supp.2d at 1088.

C. Reasonable Hourly Rate

The standard hourly rate in the Sacramento area for attorneys with the qualifications of Milton L. Chappell is at least \$275.00 per hour, at least \$150.00 per hour for Attorney Carp, and at least \$75.00 per hour for a paralegal. *Hoirup*, 2006 WL 2791158, at *4-5 (E.D. Cal. 2006); *cf. Cummings*, 2006 WL 3951867, at * 4 (counsel with half the experience of Attorney Chappell was awarded "the current prevailing market rate of \$275 per hour" in 2006, having previously been awarded \$250 in 2001, *see Cummings*, 177 F.Supp.2d at 1088-89); Chappell Decl., ¶ 23. Moreover, the court has the discretion to award fees at current rather than historic rates in order to adjust for inflation and loss of the use of funds. *Gates v. Deukmejian*, 987 F.2d 1392, 1406 (9th Cir. 1992). Here, plaintiffs request the use of 2006 rates, not 2010 rates. The court may also rely upon its own expertise and knowledge of the prevailing rates in the Sacramento area in making this determination. *See e.g., Lindy Bros. Builders v. American Radiator & Sanitary Corp.*, 487 F.2d 161, 169 (3rd Cir. 1973); *Akron Center For Reproductive Health v. City of Akron*, 604 F.Supp. 1275, 1288 (N.D. Ohio 1985).

The following table summarizes the "lodestar amount" of requested attorneys' fees:

NAME	HOURS	HOURLY RATE	LODESTAR CALCULATION
Carp	112.90	\$150.00	\$ 16,935.00
Chappell	403.30	\$275.00	\$110,907.50
Paralegal	20.00	\$75.00	\$1,500.00
TOTAL	536.20		\$129,342.50

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⁶Not included in the 536.20 lodestar hours are 110.8 hours spent on matters that are arguably excessive or duplicative and 113 hours of research time expended by Foundation research assistants. Chappell Decl., ¶ 22.

D. Attorney Out-of-Pocket Expenses

Plaintiffs request that the award include attorneys' out-of-pocket expenses in the amount of \$3,765.42 for costs, travel and related expenses, photocopying and other expenses incurred in pursuing their successful claims. Chappell Decl., ¶ 24 & Ex. 3. These out-of-pocket litigation expenses, which are normally charged to a fee-paying client in the course of providing legal services, are recoverable as part of the attorneys' fee award. *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994); *Davis v. City & County of San Francisco*, 976 F.2d 1536, 1543 (9th Cir. 1992); *Hoirup*, 2006 WL 2791158, at *5; *Cummings*, 177 F.Supp.2d at 1089-90.

The following table summarizes the requested expenses:

DESCRIPTION	AMOUNT
Filing & pro hac fees	\$230.00
Travel, hotel & meals of counsel to attend TRO hearing	\$1,324.85
Preliminary injunction transcript	\$18.00
Westlaw research on class action	\$52.49
Travel, hotel & meals of counsel to attend preliminary injunction and class certification hearings	\$1,990.08
Local counsel fees	\$150.00
Total Recoverable Expenses:	\$3,765.42

E. Reduction In Lodestar Amount To Account for Limited Success

As noted above, although plaintiffs prevailed in their litigation, they did not succeed on all of their claims or all of the monetary relief they had requested. Where plaintiffs have obtained relief that is "limited in comparison to the scope of the litigation as a whole," a reduced fee award that is "reasonable in relation to the results obtained" is appropriate. *Hensley*, 461 U.S. at 434, 438, 440; *Cummings*, 177 F.Supp.2d at 1084-88. The Ninth Circuit has approved the use of "a mathematical formula, even a crude one, to reduce the fee award to account for limited success." *Schwarz v. Secretary of Health & Human Services*, 73 F.3d 895, 904-05 (9th Cir. 1995); *Cummings*, 177 F.Supp.2d at 1084-85; *see also Cummings v. Connell*, No. S-99-2176 WBS/KJM, Memorandum and Order, slip op. at 6, 9-10 (E.D. Cal. 2003) (*Cummings* Doc. No. 254). Thus, the lodestar amount must be "reduced in a manner reflecting a partial reduction of

time expended on the unsuccessful claims and the limited relief obtained.” *Cummings*, 177 F.Supp.2d at 1086.

On the issues and claims, plaintiffs sought and were granted class certification of all nonunion “higher education employees” of CSU in bargaining units 2, 5, 7, and 9, represented by CSEA. They secured judgment on counts 3, 4, 5, 7 and 9 of their class action complaint, which challenged the constitutional adequacy of the Original, Amended and January Notices CSEA had sent plaintiffs and class members. However, they lost on counts 1 and 2, which challenged the facial constitutionality of the statute requiring nonmembers to either join the union or pay a “fair share service fee.” In terms of monetary relief, plaintiffs sought and were awarded nominal damages for defendants’ seizure of “fair share fees” in violation of *Hudson* and secured CSEA’s ultimate compliance with *Hudson*’s notice requirements. Chappell Decl., ¶¶ 12-16.

While the arguments in support of a temporary restraining order and a preliminary injunction based on defendants’ alleged violation of the *Hudson* notice requirements were unsuccessful at the time, those arguments were ultimately successful when the court entered judgment in plaintiffs’ favor with respect to the three CSEA notices. The court predicted this might happen when the preliminary injunction was denied. “There is at best a possibility that plaintiffs may ultimately succeed in establishing that the notices were procedurally defective because not sent contemporaneously with the audit reports.” (Doc. No. 38, slip op. at 9).⁷

First, it is appropriate to adjust the lodestar amount by the ratio of the time spent on successful issues and tasks to the total reasonable time spent on the case to account for plaintiffs’ partial success on the issues and claims. *Cummings*, 177 F. Supp.2d at 1086-87. A review of the reasonable hours expended by plaintiffs’ attorneys demonstrates that 383.20 hours were spent on issues and tasks on which plaintiffs ultimately prevailed and 153 hours on issues and tasks on

⁷The Ninth Circuit recognizes that if “a plaintiff ultimately wins on a particular claim, she is entitled to all attorney’s fees reasonably expended in pursuing that claim—even though she may have suffered some adverse rulings.” *Cabrales v. County of Los Angeles*, 935 F.2d 1050, 1053 (9th Cir. 1991). “Although the TRO and * * * preliminary injunction motion were denied, plaintiffs did ultimately prevail on their challenge to the adequacy of the *Hudson* notices.” *Cummings*, 177 F.Supp.2d at 1086 n.6.

which plaintiffs did not prevail.⁸ Chappell Decl., ¶¶ 19-21 & Ex. 2. The following chart summarizes the functional work performed by plaintiffs' attorneys and whether their work was ultimately successful.

TYPE OF WORK PERFORMED	HOURS	SUCCESS
Preparation of Class Action Complaint; Case Preparation	47.10	Yes
TRO Motion, Hearing & Travel	40.50	Yes
Preliminary Injunction Motion, Hearing & Travel	73.00	Yes
Class Certification Motion, Hearing & Travel	73.50	Yes
Client Communications	28.30	Yes
Class Notice on Counts 1 & 2 (Statutory Challenge) & Objections	46.60	No
Summary Judgment Motion, Hearing & Travel on Counts 1 & 2	36.60	No
Status & Scheduling Report & Conference	6.50	Yes
Settlement Conference & Discussions	6.70	Yes
Discovery (Responding to Interrogatories & Requests to Produce)	14.40	Yes
Depositions of CSEA's Auditor	69.80	No
Miscellaneous (Local Counsel & Related Case Matters)	11.70	Yes
Voluntary Dismissal of Plaintiff Ames	6.30	Yes
Motion for Entry of Judgment (Including Agreement of Parties)	38.70	Yes
Motion for Attorneys' Fees (Including Settlement of Amount & Notice)	36.50	Yes
TOTAL	536.20	383.20

Accordingly, plaintiffs' attorneys expended 71% of their time in pursuit of the successful *Hudson* notice challenge. Chappell Decl., ¶ 21. Thus, the award should be reduced to 71% of the lodestar amount to reflect the partial success on the issues.

Second, it is appropriate to adjust the lodestar amount further to reflect the limited monetary relief obtained in the award of nominal damages. Although, the technical nature of a nominal damages award does not affect the prevailing party status, it does affect the award of

⁸Of the fifteen tasks listed in the box on page 10, plaintiffs did not prevail on the summary judgment challenging the facial constitutionality of the statute, the class notice allowing class members to exclude themselves from the facial constitutionality portion of the case, counts 1 & 2, and the auditor depositions. Chappell Decl., ¶ 20.

1 fees and costs. *Farrar v. Hobby*, 506 U.S. 103, 114 (1992). In *Cummings* the court reduced the
 2 lodestar amount by an additional 25% to reflect the award of nominal damages to plaintiffs and
 3 the class members for CSEA's initial deficient *Hudson* notices. *Cummings*, slip op. at 10-11;
 4 *Cummings v. Connell*, 2006 WL 1716160, at *2 (E.D. Cal. 2006).

5 The review of plaintiffs' billing records in *Cummings* indicated that approximately 50% of
 6 the hours expended were spent in pursuit of the successful *Hudson* notice challenge. Then the
 7 court reduced the hours by an additional 25% to reflect the limited success of nominal damages
 8 in terms of monetary relief for a total reduction to 25% to account for the limited success
 9 plaintiffs achieved overall. *Id.*, slip op. at 10-11. Using the same methodology to this case,
 10 plaintiffs' billing records indicate that approximately 71% of the hours expended were spent in
 11 pursuit of the successful *Hudson* notice challenge. Reducing those hours by an additional 25% to
 12 reflect the limited success of nominal damages in terms of monetary relief, results in a total
 13 reduction to 46% of the lodestar rate to account for the limited success plaintiffs achieved overall
 14 – both on the issues and the monetary relief. *Accord, Marhoefer*, 23 F.3d at 18; Chappell Decl.,
 15 ¶ 25.

16 “Plaintiffs prevailing in a civil rights action should ordinarily receive attorney’s fees
 17 unless special circumstances would render such an award unjust.” *Sable Commc’ns v. Pacific*
 18 *Tel. & Tel.*, 890 F.2d 184, 193 (9th Cir. 1989). Because plaintiffs prevailed on the merits of their
 19 § 1983 claims, the court should allow them reasonable attorneys’ fees and out-of-pocket
 20 expenses. *Cummings*, 2006 WL 3951867, at *2. There are no special circumstances which
 21 would justify denying an award of fees and costs. *Id.*

22 Forty-six per cent of the lodestar amount of \$129,342.50 is \$59,497.55. Adding the
 23 \$3,765.42 in costs, expense, travel and related expenses incurred in pursuing plaintiffs’
 24 successful claims to that amount equals \$63,262.97. However, as agreed to by the parties,
 25 Plaintiffs are only seeking \$45,500.00 in attorneys’ fees. Chappell Decl., ¶¶ 17, 25-26.

26 **F. Rule 23(h) Considerations**

27 If attorneys’ fees are warranted, the court’s primary duty is to determine what constitutes a
 28 fair and reasonable award. *Cummings*, 2006 WL 3951867, at *2; *Hoirup*, 2006 WL 2791158, at

*3. Where, as here, the amount of the attorneys' fees award has been agreed upon subject to court approval, the court must ensure that the interests of the class are protected and have not been sacrificed to the advantage of the defendants and the plaintiff's attorneys. *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1397 (9th Cir. 1999).

Rule 23(h), FED.R.CIV.P., governing attorneys' fees in class actions, makes clear that they may only be paid pursuant to a Rule 54(d)(2) motion, but Rule 54(d)(2)(B) and the commentary to Rule 23(h) establish that fee agreements are relevant to what amount of fees should be awarded. This is particularly true where the settlement of the fee claim is not linked to compromise of any other claim and is the result of arms-length negotiation by counsel for the parties who are thoroughly familiar with the case and knowledgeable in this area of the law. *Hoirup*, 2006 WL 2791158, at *3; *see also* Chappell Decl., ¶ 17.

Like *Cummings*, 2006 WL 3951867, at *2, this case has no danger of collusion between the parties with regard to the agreement for attorneys' fees. Most importantly, the agreement at issue pertains **ONLY** to the matter of attorneys' fees. It does not purport to resolve any of plaintiffs' claims on the merits. Indeed, plaintiffs' claims were resolved in their favor by the judgment entered on February 24, 2010, which was dictated by the 2006 order and judgment in *Cummings v. Connell*, 2006 WL 1716160 (E.D. Cal. 2006). Thus, the class members have obtained all relief available under controlling law. The attorneys' fees will be paid by Defendant CSEA and will not come out of the damages awarded plaintiffs and the class. As the court knows, the parties' attorneys are experienced in litigation involving the issues which were the subject of the complaint. Accordingly, the payment of the agreed-upon amount of attorneys' fees is reasonable and not contrary to the interests of the class.

III. CONCLUSION

Using the guidance provided by this court's decisions awarding attorneys' fees in *Cummings*, the parties have settled this claim in order to avoid the time, expense, and uncertainty of a dispute over the appropriate amount. Their compromise accounts for limitation in the success achieved and unproductive or excessive time expenditures. For the reasons stated herein, plaintiffs, on behalf of themselves and the class that they have successfully represented, seek an

award of their statutorily-entitled attorneys' fees, expenses and costs, in the agreed-upon amount of \$45,500.00.

DATED: March 24, 2010

Respectfully submitted,



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Attorneys for Plaintiffs and the Class

PROOF OF SERVICE

I hereby certify, under penalty of perjury, that a true and correct copy of this Motion for Award of Attorneys' Fees, Cost and Expenses Pursuant to 42 U.S.C. § 1988 was deposited in the United States Mail, first-class postage pre-paid, addressed to:


Nancy T. Yamada, Attorney
Cal State University Employees Union, SEIU Local 2579
California State Employees Association
1108 "O" Street, 5th Floor
Sacramento, CA 95814
Attorney for Defendant California State University Employees Union

I further certify, under penalty of perjury, that I electronically filed with the Clerk of the Court the foregoing Motion for Attorneys' Fees using the CM/ECF system which will send notification of such filing to:

Jeffrey B. Demain
Attorney for Defendant California State University Employees Union

Douglas J. Woods
Attorney for Defendant John Chiang, Controller of the State of California

All of these actions were taken on the 24th day of March, 2010.


Milton L. Chappell, Esq. (*pro hac vice*)